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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re MARGO JOHNSON, on Habeas Corpus.	B222122 & B196040 (Los Angeles County Super. Ct. No. A-636566)

ORIGINAL PROCEEDING on a petition for writ of habeas corpus. Relief granted.

Michael J. Brennan and Heidi L. Rummel, Post-Conviction Justice Project, University of Southern California Law School, for Petitioner.

Edmund G. Brown, Jr. Attorney General, Julie L. Garland, Senior Assistant Attorney General, Julie A. Malone and Kim Aarons, Deputy Attorneys General, for Respondent.

Margo Johnson filed a writ of habeas corpus seeking an order overturning the Governor's 2009 decision to reverse the Board of Parole Hearings Board's (the Board) 2009 order granting Johnson parole, and reinstating of the Board's parole release order. In 1987, Johnson was sentenced to an indeterminate term of 15 years to life in state prison for second degree murder. The Board found Johnson suitable and granted parole in 2003, 2005, 2006, 2007 and 2009. On each occasion the Governor, exercising his authority under Article V, section 8, subdivision (b), of the California Constitution and Penal Code section 3041.2, reversed the Board's decision. In February 2010, Johnson filed the instant petition in which she argued, inter alia, that the Governor's 2009 reversal was not supported by "some evidence" that she currently posed an unreasonable risk of danger to society if released and thus violated her right to due process. She specifically argues that the Governor misstates the evidence concerning the commitment offense and has failed to establish a nexus between the commitment offense and her current dangerousness. She further asserts the Governor misconstrued evidence to conclude erroneously that she lacks insight into her crimes and has not accepted full responsibility for her actions. As we shall explain more fully below, we agree with Johnson. In our view, the evidence the Governor relied upon to justify the reversal of the Board's decision, lacks a rational basis in fact and sufficient indicia of reliability. Furthermore, the identified facts that do find support in the record are not probative to the central issue of current dangerous when considered in light of the full record. Accordingly, we grant relief.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. *Johnson's Background.*

Johnson was born in 1960 and raised in a gang-infested area of South Central Los Angeles. She was the third of five children in her family. Before she was born her parents briefly separated and because of the separation, her father never accepted her as

his child. As a result, both her father and her paternal grandmother treated Johnson poorly – differently than they treated the other children in the family.

When Johnson was 11 years old her father's cousin began to sexually molest her; the sexual abuse continued for more than a year. According to Johnson, her efforts to report the abuse to adults were ignored. As a result of the molestation, at age 12 she became pregnant and gave birth to a baby boy. Her pregnancy resulted in her becoming ostracized and isolated from others her age. She began abusing drugs at age 13.

When she was 16 years old a juvenile delinquency petition was sustained against her for assault – she struck a friend with a broomstick during a fight. She served probation for the offense.[1] From age 15 until her arrest on the commitment offense she used drugs, sold drugs and traded for them. Johnson's male relatives were heavily involved in gangs, but Johnson has never been a gang member.

After graduating from high school, Johnson married. Johnson's husband sold drugs and was eventually convicted and sent to prison for manufacturing drugs and bank robbery. Johnson gave birth to a second child in the 1980s.[2]

B. *The Commitment Offense*.

On April 8, 1986, and the next morning, April 9, Johnson used drugs. At about 9:00 a.m. on the morning of April 9, Johnson's mother came to Johnson's apartment and told her than a family friend, a young man, by the name of Travis had been beaten-up and robbed. Johnson was friendly with Travis' mother; Johnson had apparently told Travis' mother that she would look out for Travis when his mother moved away from the neighborhood. Because Johnson felt responsible for Travis, she went to look for him. She located Travis a couple blocks away. Travis had been beaten and robbed of jewelry,

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[1] Johnson was also arrested in 1978 for possession of a controlled substance, possession of stolen property in 1982 and 1983 and as an accessory. None of these prior arrests resulted in convictions.

[2] Her first son, born as a result of her molestation, was killed in a gang-related shooting in 1999.

drugs and money. At the time, Travis was with another man known as "Baldy." Johnson stated that Baldy asked her to drive him and Travis to the hospital in Baldy's car. En route to the hospital, they stopped at a red light at the intersection of Avalon and 92nd Street. According to Johnson, while stopped at the signal, Travis, who sat in the backseat, pointed out a man, later identified as Gregory Crier, crossing the street. Travis told Baldy and Johnson that Crier was the person who had beaten him. Johnson claims Baldy got out of the car and took a large caliber gun with him and began to argue with Crier. Johnson said Baldy began to shoot at Crier. She grabbed a second, smaller handgun that was on a seat in the car. Johnson got out of the car, entirely or partially and also began firing at Crier as he ran down the street.

Immediately after the shooting, Johnson and Baldy got back into the car and drove away. Johnson stated that she did not take Travis to the hospital because she was afraid. Instead, Johnson drove back to where she had picked up Travis and Baldy, she left them and walked home.

Johnson stated that she did not know where the gun had come from that she had used; she said that she did not initially see any guns in the car and assumed that they had belonged to Baldy. She also stated that she did not know that Crier had been injured or killed until she was arrested a month later. Johnson stated that she did not see anyone get shot or hurt that day.

According to the police report, Crier was struck by a large caliber bullet and died later that day as a result of the gunshot wound. A young woman, by the name of Penny Gibson, was also injured in the shooting.

In May 1986, Johnson was arrested[3] and charged with second degree murder. At the time of her arrest, Johnson did not implicate Baldy because she was afraid of him and what he might do to her family.

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[3] At the time of her arrest, Johnson possessed a vial of PCP.

At the preliminary hearing in July 1986, the surviving victim Gibson testified that shortly before the shooting she was standing at a bus stop at 92nd and Avalon streets with Crier. She testified that she observed Johnson running down the street, chasing two men. Gibson indicated that Johnson carried a gun and was firing it at the men. Gibson said that Johnson ran out of sight, but then returned five minutes later and approached Gibson. Gibson testified that Johnson asked her if she was a "Crips" gang member and that when Gibson said no, Johnson shot her in the arm with a large caliber gun like a .38. Gibson said that at the time Crier was standing behind her and the bullet that hit Gibson went through her, striking Crier. Gibson stated that Johnson then fired again at Crier. Gibson was not certain whether Crier was hit by the second shot, but she indicated that he fell to the ground at some point and that Gibson ran across the street. Gibson indicated that in total about five shots were fired. Gibson's testimony did not make any mention of any other shooters.

An independent eyewitness to the crime, a Mr. White, observed the shooting from across the street. Mr. White told police that he saw Johnson get out of a green Plymouth that was parked at 91st and Avalon. Mr. White stated that he observed Johnson put an "unknown" item under her jacket and walk towards 92nd and Avalon and about one minute later he heard two shots coming from 92nd and Avalon. Mr. White looked across the street and saw Johnson firing a handgun at the two victims. He then saw Johnson and a second suspect run back to the green Plymouth.

In January of 1987, Johnson pled guilty to second degree murder. According to the probation report prepared for sentencing Johnson apparently stated: "Defendant took Travis to the Doctor and on the way he pointed out victim Gregory Crier as the guy who had jumped on him. Seven or eight hours later defendant shot the victim. She says that she is sorry for what she did. The girl that was shot was 'an accident.'"

On February 19, 1987, Johnson was sentenced to 15 years-to-life in custody.

C. *Post-Conviction Conduct.*

During Johnson's 23 years in prison, Johnson has worked in various trades, participated in educational and self-help programs and completed college courses. She

addressed her pre-prison drug problems through specific rehabilitation programs including, AA, NA, Relapse prevention from Drugs and Criminal Behaviors, and Substance Abuse Prevention Training. She has participated in stress management programs, conflict resolution, anger management classes, and conflict transformation skills courses. Johnson has served as a peer counselor for other inmates in the substance abuse prevention program. She has taken classes at Chaffey College, earning a 3.4 grade point average and other courses through Loyola Marymount University. She has also participated in more than 20 community service programs including, the Women's Advisory Council, Sharing Our Stitches, Toastmasters, Happy Hats for Kids, Inmate Assistance Social Skills, Convicted Women Against Abuse, Pathways to Wholeness, HIV/AIDS Peer Education, and various religious organizations and programs. While in prison she has worked as a peer advisory and counselor to other women who have suffered child sexual abuse She has completed vocational training in janitorial services, carpentry, upholstery, basic plumbing, and office services. She has successfully completed prison work assignments in culinary, yard crew, inmate day labor, upholstery, plumber, painter, labor clerk, porter, substance abuse program.

Over the years she has received consistent positive reports about her strong work ethic, and positive attitude. Her supervisors have described her as "an excellent worker" and "always applying herself" "a pleasure to work with," "a great attitude" and "works well independently and with others." Johnson has also received numerous letters of support from various members of prison programs, religious organizations and individuals, including the woman Johnson had assaulted with a broomstick when they were teenagers in 1976.

In Johnson's earliest mental health evaluations in the late 1980s, Johnson claimed to lack a clear memory of the shooting, or where the gun came from. The 1989 mental evaluation report stated that "Johnson largely denies responsibility of the crime." Based on her family background and pre-prison experiences and conduct in 1989 she was diagnosed with antisocial personality disorder. (Pet. Exh. AA; Pet. Exh. BB.)~ Johnson began participating in individual and group therapy to deal with her childhood sexual

abuse and trauma and her drug abuse. The 1994 mental health evaluation stated that Johnson could recall the circumstances of the crime. It further indicates that Johnson "admits that she was involved in the shooting" and shot at the victims, but that she "disputes somewhat the notion that she may have been responsible" because of the evidence that the bullet which struck one victim was from a large caliber gun—not the gun Johnson carried. The 1994 report further indicated that Johnson continued to suffer from an anti-social personality disorder, but that she was making progress in her mental health program to address it. Mental health evaluations from the late 1990s through the early 2000s, indicate Johnson's continued involvement and participation in mental health programs, self-help, and individual and group counseling. By the 2005 evaluation, Johnson's anti-social personality disorder was found to be in remission. The 2005 report notes: "Johnson has not proven herself to be violent, antisocial or intimidating . . . in the course of her custody for the past 10 years . . . there is no mental health disorder or substance abuse disorder which is active." The 2005 report was fully supportive of her release, and noted her active involvement in substantive abuse programs.

A 2008 mental evaluation stated that Johnson's anti-social personality disorder was in total remission and that Johnson presented a "low likelihood of becoming involved in a violent offense if released into the free community." The 2008 report indicated that Johnson displayed "prosocial" rather than antisocial attitudes.

Johnson has no history of involvement with gangs, criminal activity or substance abuse while in prison. In 23 years she has had six 115 violation reports all of which occurred during the first three years of her incarceration and the last of which occurred in 1989. Her 115 conduct included physical altercations, the refusal to be restrained, to inciting others, to presence in an unauthorized area. Johnson also received 20 rule 128A

incident reports for minor misconduct such as misuse of the telephones and the failure to report to a job assignment.[4] Her last 128A counseling report was issued in 1996.

D. *Prior Parole Suitability Proceedings.*

In March 1995, at Johnson's first parole suitability hearing, the Board denied her parole based primarily on the nature of the commitment offense, which the Board found was carried out in an "especially atrocious, cruel and callous manner." The Board further noted Johnson's escalating pattern of criminal conduct and unstable social history. The Board denied parole for two years, concluding Johnson needed to attend therapy to learn to cope with stress in a non-destructive manner.

In April 1997, the Board denied Johnson parole for the second time. The Board cited the nature of the commitment offense, other pre-commitment offense criminal conduct and mental health history. The Board denied parole for four years.

In April 2001, Johnson was denied parole by the Board for the third time. The Board cited for its denial, the nature of the commitment offense and her previous arrests. The Board did acknowledge Johnson's record of remaining discipline free during the prior period and her participating in self-help programs and therapy. The Board also quoted from a mental evaluation that commented on Johnson's lack of remorse and attributed to Johnson an admission that she held the gun, and fired it, but also denial that she actually shot anyone.

In October 2003, the Board found Johnson suitable for parole for the first time. In March of 2004, the Governor reversed the Board's decision based on her unstable social history, pre-commitment criminal conduct, her institutional discipline record, lack of remorse and minimization of her conduct.

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[4] A "115" report documents misconduct believed to be a violation of the law that is not minor in nature, while a 128 report documents incidents of minor misconduct. (Cal. Code Reg., tit. 15 § 3312 (a)(2); *In re Gray* (2007) 151 Cal.App.4th 379, 389.)

In January 2005, the Board found Johnson suitable for parole for a second time. In July 2005, the Governor reversed the Board's decision, finding Johnson unsuitable for parole for the same reasons as stated in the 2003 reversal. The Governor also expressed a concern that Johnson's version of the crime as she related at both the 2003 and 2005 Board hearings were not consistent with the evidence presented at the preliminary hearing, her statements included in the probation report and statement in her 2001 mental health evaluation. The Governor stated that the inconsistent versions demonstrated that she lacked insight into her actions and had not taken responsibility for her criminal conduct. The Governor concluded that the gravity of the crime was sufficient alone to conclude that Johnson would pose an unnecessary risk of danger if released.

In February 2006, the Board found Johnson suitable for parole for a third time. In July 2006, the Governor reversed the Board's decision and again found Johnson unsuitable for parole, based on the grave nature of the commitment offense. The Governor acknowledged that while Johnson stated that she was remorseful and accepted responsibility for the crimes, her version of events had changed over the years, which indicated that she was unable or unwilling to fully grasp or fully accept responsibility for her actions.

E. *Habeas Proceedings (Case No. B196040) and 2008 Board Proceedings.*

In January 2007, Johnson filed a petition for a writ of habeas corpus in this court (case No. B196040) challenging the Governor's 2005 and 2006 reversals of the Board's parole decisions finding her suitable for parole.[5] She argued that the Governor incorrectly applied the "some evidence" standard and that his decisions were arbitrary and capricious. This court issued an Order to Show Cause (OSC). In the fall of 2007, respondent filed a request for a stay of the appellate proceedings pending decisions of the California Supreme Court in *In re Lawrence* (2008) 44 Cal.4th 1181 and *In re Shaputis* (2008) 44 Cal.4th 1241. This court granted the stay in December of 2007.

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[5] In April 2007, Johnson had another parole hearing at which the Board found her suitable for parole. The Governor reversed the Board's decision in September 2007.

On April 24, 2008, Johnson again appeared before the Board for another parole hearing. At the 2008 hearing the Board found Johnson unsuitable for parole because the mental report prepared for the hearing did not address the status of Johnson's anti-social personality disorder. The Board requested that the mental evaluation be updated to address the matter before the next hearing scheduled for the fall of 2009. Board members also expressed a concern over the fact that Johnson's version of the crime continued to differ from that of the victim Penny Gibson, which suggested to the Board that Johnson was still minimizing her conduct and had failed to take full responsibility for her actions. The Board recommended that Johnson review the transcripts. The Board scheduled Johnson another hearing in April 2009.

Lawrence and *Shaputis* were decided in August 2008. Johnson asked this court to lift the stay in the appellate proceedings. This court granted the request to lift the stay in January of 2009. This court requested the parties provide supplemental briefing concerning *Lawrence* and to provide this Court with additional information about all parole proceedings subsequent to the filing of the 2007 petition.

F. *2009 Suitability Proceedings.*

1. Suitability Hearing and the Board's Decision

The Board conducted another parole suitability hearing on April 2009. At the hearing Johnson testified concerning her background, her prison conduct and self development, and the circumstances surrounding the commitment offense. As she had at prior hearings, Johnson recounted the details of the offense and again stated that she was unaware that anyone had been injured in the shooting. She testified that she got "halfway" out of the car and fired at Crier. She further stated that she did not know where the guns came from – that they must have been in Baldy's car but that she did not see them initially. Nonetheless, she acknowledged the use of the gun and took full responsibility for the death of Crier and the injuries to the other victim. She further recounted her release housing and employment plans, and her training in prison. She stated that she was remorseful for the shootings and the injuries to the victims.

The Board received into evidence the updated information on the prior mental evaluation. The updated information indicated that Johnson's mental status no longer warranted a diagnosis of "anti-social personality disorder." When questioned by the Board about the differences in her version of the crime in comparison to the testimony of Gibson, Johnson denied the accuracy of Gibson's version. Johnson's counsel pointed out that Gibson's version differed from that of the other witness, Mr. White. The district attorney continued to state his opposition to Johnson's release.

At the conclusion of the hearing, the Board found that Johnson was suitable for parole. The Board noted Johnson had programmed commendably, had obtained marketable skills, educational advancement, had a strong and positive work history and personal development and regularly participated in AA and NA. The Board also noted Johnson had acceptable parole plans and had positive psychological evaluations showing that she was a low to moderately low risk of future violence. The Board noted that although the crime was very serious, and that differences existed between Johnson's version of the crime and that of Gibson, the differences were "subtle" and that Johnson no longer posed a threat to society if released.

2. The Governor's Reversal

On September 9, 2009, the Governor reversed the Board's 2009 parole decision. In reversing the Board's decision, the Governor relied on the nature of the commitment offense, her insufficient insight into her crime and failure to take full responsibility for her actions.

G. *Habeas Proceedings.*

In February 2010, Johnson filed the instant petition for a writ of habeas corpus in this court challenging the Governor's reversal of the Board's 2009 decision to grant her parole.[6]

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[6] Johnson's 2007 petition for a writ of habeas corpus challenging the Governor's reversal of the parole date set by the Board as a violation of her state and federal due process rights is currently pending in this court. (*In re Johnson*, case No. B196040.) As indicated elsewhere, the 2007 petition challenging the Governor's reversals of the

DISCUSSION

Before this court Johnson contends the Governor erred in reversing the Board's 2009 decision to grant her parole. She asserts the Governor's finding that she was not suitable for parole was not supported by evidence in the record. She specifically argues that the Governor misstates the evidence concerning the commitment offense and has failed to establish a nexus between the commitment offense and her current dangerousness. She further asserts the Governor misconstrues evidence to conclude erroneously that she lacks insight into her crimes and has not accepted full responsibility for her actions. Finally she claims the Governor did not give adequate weight to the positive factors in her background and post incarceration programming that favor her release from prison.

A. Legal Framework Governing Parole Suitability Assessments.

"The granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals as soon as possible and alleviate the cost of maintaining them in custodial facilities. [Citations.] Release on parole is said to be the rule, rather than the exception [citations] and the Board is required to set a release date unless it determines that 'the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration. . . .' [Citation.]" (*In Re Vasquez* (2009) 170 Cal.App.4th 370, 379-380 (*Vasquez*).)

The decision whether to grant parole is a subjective determination, guided by a number of factors, some objective, identified in Penal Code section 3041 and the Board's

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Board's 2005 and 2006 decisions to grant Johnson parole were filed prior to the issuance of the decisions in *Lawrence* and *Shaputis*; and we have elected to consider the more recent 2009 parole denial first. In light of our decision to grant the petition, by separate order we will discharge the order to show cause in B196040 and dismiss that petition as moot once this decision is final. To the extent not included in the exhibits accompanying the instant petition, we take judicial notice of the exhibits filed in B196040. (See Evid. Code, §§ 452, 459.)

regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 660-661, 655 (*Rosenkrantz*).) The Governor's decision to affirm, modify, or reverse the decision of the Board rests on the same factors that guide the Board's decision (Cal. Const., art. V, § 8, subd. (b)),[7] and is based on "materials provided by the parole authority." (Pen. Code, § 3041.2, subd. (a).)[8] "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*Rosenkrantz, supra,* at pp. 660-661.)

In making the suitability determination, the Board and the Governor must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter Pen. Code, § 2402), such as the nature of the commitment offense including behavior before, during, and after the crime; the prisoner's social history; mental state; criminal record; attitude towards the crime; and parole plans. (Pen. Code, § 2402, subd. (b).) The circumstances that tend to show unsuitability for parole include that the inmate:

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[7] Article V, section 8, subdivision (b), of the California Constitution provides, "No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action."

[8] Penal Code section 3041.2 provides, "(a) During the 30 days following the granting, denial, revocation, or suspension by a parole authority of the parole of a person sentenced to an indeterminate prison term based upon a conviction of murder, the Governor, when reviewing the authority's decision pursuant to subdivision (b) of Section 8 of Article V of the Constitution, shall review materials provided by the parole authority. [¶] (b) If the Governor decides to reverse or modify a parole decision of a parole authority pursuant to subdivision (b) of Section 8 of Article V of the Constitution, he or she shall send a written statement to the inmate specifying the reasons for his or her decision."

(1) committed the offense in a particularly heinous, atrocious, or cruel manner;[9] (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (Pen. Code, § 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (Pen. Code, § 2402, subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (Pen. Code, § 2402, subd. (d).)

These criteria are "general guidelines," illustrative rather than exclusive, and "'the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [Board or Governor].'" (*Rosenkrantz, supra*, 29 Cal.4th at p. 654; Pen. Code, § 2402, subds. (c), (d).) Thus, the endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without

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[9] Factors that support the finding the crime was committed "in an especially heinous, atrocious or cruel manner" (Pen. Code, § 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

committing additional antisocial acts." (*Rosenkrantz, supra,* at p. 655.) Such a prediction requires analysis of individualized factors on a case-by-case basis. While parole unsuitability factors need only be found by a preponderance of the evidence, the Governor's decision, like the Board's decision, must comport with due process. (*Id*. at pp. 660, 679.)

B. Judicial Review.

In *Rosenkrantz,* the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court held that "the judicial branch is authorized to review the factual basis of a decision of the Board denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based on the factors specified by statute and regulation." (*Rosenkrantz, supra*, 29 Cal.4th at p. 658.)

In conducting this independent review of the Governor's decision, "[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Rosenkrantz, supra*, 29 Cal.4th 616, 677.) "The court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's [or Board's] decision." (*Ibid*.)

In *In re Lawrence, supra,* 44 Cal.4th 1181 (*Lawrence*), the Supreme Court reaffirmed its analysis in *Rosenkrantz, supra*, 29 Cal.4th 616, that the decision of parole suitability is subject to the "some evidence" standard of review. (*Lawrence, supra,* at p. 1205.) However, in doing so it recognized that *Rosenkrantz*'s characterization of that standard as extremely deferential and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra,* at p. 667), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra,* at p. 1206 .) The court in *Lawrence*, recognized that the legislative scheme contemplates "an assessment of an inmate's current dangerousness" (*Id*. at p.

1205). "[I]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights. If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry. Such a standard, because it would leave potentially arbitrary decisions of the Board or the Governor intact, would be incompatible with our recognition that an inmate's right to due process 'cannot exist in any practical sense without a remedy against its abrogation.'" (*Id*. at p. 1211, quoting *Rosenkrantz, supra,* 29 Cal.4th at p. 664.) Accordingly the court in *Lawrence* clarified that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id.* at p. 1212.) "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public." (*Ibid*.) Indeed not only must there be some evidence to support the Board's factual findings there must be some connection between the findings and the conclusion that the inmate is currently dangerous.

As to this standard, the court in *Lawrence* further explained that although it was "unquestionably deferential, [it was] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision – the determination of current dangerousness." (*Lawrence, supra,* 44 Cal.4th at p. 1210, italics added.) In other words, the exceedingly deferential nature of the "some evidence" standard does not convert a reviewing court "'into a potted plant.'" (*Lawrence, supra,* 44 Cal.4th at pp. 1211-1212, quoting *In re Scott* (2004) 119

Cal.App.4th 871, 898 (*Scott I*).) We must ensure that the denial of parole is based on "some evidence" of current dangerousness. "[S]uch evidence '"must have some indicia of reliability."'" (*Scott I*, 119 Cal.App.4th at p. 899.) "[T]he 'some evidence' test may be understood as meaning that suitability determinations must have some rational basis in fact." (*In re Scott* (2005) 133 Cal.App.4th 573, 590, fn. 6 (*Scott II*).)

Because consideration of public safety is the primary statutory issue to be determined in deciding whether an inmate should be granted parole (Pen. Code, § 3041, subd. (b); *Lawrence*, supra, at p. 1205), "[t]his inquiry is, by necessity and by statutory mandate, an individualized one," and requires a court to consider the circumstances surrounding the commitment offense, along with the other facts in the record, to determine whether an inmate poses a current danger to public safety. (*Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255 (*Shaputis*).) "Relevance to the issue of the inmate's current risk to public safety is the key." (*Lawrence*, *supra*, at p. 1219.)

Regarding such consideration, "although the Board and Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner's pre-or post incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.)

In this case, the current petition for habeas relief is an original proceeding that requires we independently review the record to determine whether there is some evidence to support the Governor's decision to reverse the Board's grant of parole for Johnson. (*In re Scott* (2004) 119 Cal.App.4th 871, 884.) In other words, "we independently review the record [citation] to determine 'whether the identified facts [by the Governor] are probative to the central issue of current dangerousness when considered in light of the full record before [him].' [Citation.]" (*Vasquez*, *supra*, 170 Cal.App.4th at pp. 382-383.)

C. Analysis of the Governor's Reversal.

The Governor expressed two related concerns in reversing the Board's decision to release Johnson from prison: (1) the nature of the commitment offense, which the Governor described as "especially heinous" because of multiple victims, and also because the motive for the crime was "trivial in relation to the offense she committed"; and (2) Johnson has insufficient insight and has failed to accept responsibility for her conduct because she "continues to change" her explanation of the crime and because Johnson's version of the events differs from that of the surviving victim and other evidence. We examine the factors mentioned by the Governor.

1. Johnson's Insight and Responsibility

An inmate's acceptance of responsibility and signs of remorse may be considered in determining the inmate's suitability for parole. (Cal. Code Regs., tit. 15, Pen. Code § 2402, subd. (d)(3); *Shaputis, supra*, 44 Cal.4th at p. 1246.)[10] In addition, to the extent these factors show an inmate lacks insight into and understanding of the behavior precipitating the commitment offense, they can support a conclusion the inmate is currently dangerous. (*Shaputis, supra*, 44 Cal.4th at p. 1260.) Expressions of insight and remorse will vary from inmate to inmate and there are no special words for an inmate to articulate in order to communicate he or she has committed to ending a previous pattern of violent or antisocial behavior. (*Shaputis, supra*, 44 Cal.4th at p. 1260, fn. 18.) Like all evidence relied upon to find an inmate unsuitable for release on parole, "lack of insight" is probative of unsuitability only to the extent that it is both (1) demonstrably shown by

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[10] An inmate cannot, however, be required to discuss the circumstances of the commitment offense or to admit guilt in order to be found suitable for parole. (Pen. Code, § 5011; Cal. Code Regs., tit. 15, § 2236.) Nonetheless, if an inmate chooses to discuss the circumstances of the commitment offense, or the inmate's responsibility and remorse for an offense, the Board and Governor may consider the inmate's remarks to the extent the remarks are relevant to the inmate's parole suitability. (Cal. Code Regs., tit. 15, § 2402, subd. (b) ["All relevant, reliable information available to the panel shall be considered in determining suitability for parole."].)

the record and (2) rationally indicative of the inmate's current dangerousness. (*In re Calderon* (2010) 184 Cal.App.4th 670.) [11]

a) "Changes" and Inconsistencies in Johnson's Explanation

In reversing the Board's decision to release Johnson on parole, the Governor stated that he "was concerned that Johnson has not yet gained sufficient insight into or accepted full responsibility for the murder because she continues to change her explanation of the murder in ways that minimize her actions in the crime." Our review thusly begins with the issue of whether there is "some evidence" to support the Governor's factual finding that Johnson "continues to change her explanation" of the crime.

In support of this finding the Governor relies on a number of statements attributed to Johnson as reflected in reports of various mental evaluators and others. First, the Governor points out that in 1986 Johnson purportedly told the probation officer that the shooting took place *seven to eight hours* after she took Travis to the hospital; and that the shooting of Gibson was an accident. The Governor also referenced a 1989 report prepared by her mental health evaluator which stated that Johnson, "largely deni[ed] responsibility for the crime because she had no recollection of the shooting or where the

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[11] We note with interest the recent observation of Division Two of the First District Court of Appeal that after *Shaputis*, the weight and reliance upon "insight" in recent decisions of both the Board and the Governor has increased dramatically: "The weight placed on this factor by the *Shaputis* court has stimulated far greater use of it by the Board and Governor than was formerly the case. Considering that 'lack of insight' is not among the factors indicative of unsuitability for parole specified in the sentencing regulations and has been rarely relied upon by the Board or Governor in the past, the increasing use of this factor is likely attributable to the belief of parole authorities that, as in *Shaputis*, 'lack of insight' is more likely than any other factor to induce the courts to affirm the denial of parole. But the incantation of 'lack of insight,' a more subjective factor than those specified in the regulations as indicative of unsuitability, has no talismanic quality." (*In re Calderon*, *supra*, 184 Cal.App.4th at pp. 689-690; fn. omitted.)

gun came from"; and Johnson also apparently told the evaluator that she was falsely imprisoned and never pled guilty to second degree murder.

Assuming these statements have been accurately attributed to Johnson, they do appear somewhat incompatible with the later description Johnson provided concerning the crime. However, the record also shows that Johnson made these statements before she was sent to prison and/or shortly after she was sent to prison during a period when Johnson clearly struggled to follow prison rules as reflected by her six 115 Reports rule violations between 1987 and 1990 and during a time when Johnson had not yet begun to participate in any rehabilitation or therapy programs. By the mid-1990s, a demonstrative shift in Johnson's mental attitude appears in the record. Johnson began to participate in rehabilitation, prison work, self-help and educational programs, as well as individual and group therapy to deal with her childhood sexual abuse, her drug dependency and the other issues that led to her criminal lifestyle. By 1994 Johnson began to gain more insight into her behavior. Her 1994 psychiatric evaluation notes that her judgment and insight had improved because of an enhanced ability to avoid disciplinary problems and greater insight into her anger caused by her childhood sexual abuse.

Thus, Johnson's earliest statements concerning the crime, when placed in their full context, are not particularly probative on the ultimate issue – whether Johnson currently lacks insight into her crimes. It is not uncommon for inmates to initially deny responsibility (and/or display a lack understanding) for his or her criminal conduct that led to the commitment offense, and then later after participation in rehabilitation programs to accept responsibility and gain insight. As the Court observed in *Lawrence*, the "Legislature explicitly recognized that the inmate's threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law . . . it is evident that the Legislature considered the passage of time-and the attendant changes in a prisoner's maturity, understanding, and mental state-to be highly probative to the determination of current dangerousness." (*Lawrence*, *supra*, 44 Cal.4th at pp. 1219-1220.) In view of these circumstances, the value of the static fact that the inmate initially lacked insight and or

denied or minimized his or her responsibility is diminished over time, especially in view of clear evidence as in this case, that the inmate has participated in treatment, education and rehabilitation programs while in prison. Indeed, as the Board Commissioner observed during the 2009 hearing: "If I focus on reading the Probation Report and other reports, and focus on that, and only go with that, I probably would [deny parole]. But we have to look at the overall picture. . . ." Acceptance of responsibility over time shows maturation of the inmate, this goes to the heart of the rehabilitative purpose of incarceration.

This notwithstanding, the Governor also points to Johnson's subsequent mental evaluations to support his factual finding that Johnson "continues to change her explanation" of the crime. The Governor relies on a number of purported inconsistencies in Johnson's version of the crime as she related the events to various mental health evaluators in the 1990s and 2000s. However, as with Johnson's earliest statements about the crime, when her subsequent remarks are viewed in context they do not provide a rational basis for the Governor's contention.

First, in 1994 Johnson apparently told the mental health evaluator: "they [Johnson, Baldy and Travis] all got out of the car and began chasing [Crier], shooting . . . [But] the inmate disputes somewhat the notion that she may have been responsible, indicating that she was later told that the bullet was from a large caliber gun, and claimed she was using a small caliber gun. Nonetheless, she did admit that she was shooting." The Governor also relies on evidence from a 1997 psychiatric evaluation, in which Johnson informed the evaluator that she had nothing new to add to the 1994 report. The evaluator noted that Johnson's version of the events differed from that of Gibson.

The Governor also cited to statements Johnson made to her mental health evaluator in 2001, as described by a Board member during the parole hearing: "she does not offer any plausible explanation other than to state that while the gun was in her hand she never used it. That she stayed in front of the car and denies shooting anyone." The Governor failed to point out, however, that during the 2001 proceedings before the Board that Johnson admitted she fired the weapon: "[Getting out of the car to shoot at the

victims] That's the dumb thing that I did . . . I did fire the gun." Johnson also explained her statements to the mental evaluator: "Dr. McDaniel, he asked me did I shoot the person. I told him I don't know because two of us was shooting. I never said I didn't. And I always owned up to responsibility . . . I was there and I did fire a gun and it didn't make no sense."

The Governor also pointed out that in 2003 Johnson stated that she got out of the car and that she and a fellow passenger shot at a group of people, and that she was not sure if the bullets from her gun actually killed the victim. The Governor omits from his reference to the 2003 report the fact that the evaluator also stated that Johnson claimed responsibility for "her own action of shooting at these people" and "she recognized that she should have proceeded with driving her friend to the hospital to receive the medical care that he required."

The Governor further cites to Johnson's 2005 mental health evaluation in which she apparently told the evaluator that Baldy and Travis were gang members and the hospital was in an area outside the gang territory, which Johnson believed may have caused Baldy to place loaded guns in the vehicle. In 2007, the Governor points out that Johnson told the Board that she did not initially tell anyone about Baldy because she was afraid of him, but had since learned he had passed away and thus, she was no longer fearful. The Governor's 2009 reversal also relates that in 2008 Johnson told the mental health evaluator the same version of the events as at the 2007 hearing, except that in 2008 Johnson stated that "she leaned out of the car" and fired the gun. The Governor further noted that in 2008 when the Board denied parole it expressed a concern that Johnson's version did not match that of Gibson or Mr. White.

Finally, as supportive of the contention that Johnson has continued to change her explanation over the years, the Governor cites to testimony at the 2009 Board hearing in which when asked where she obtained the gun, Johnson stated that she did not know, that the gun "pops up all of a sudden" and that she did not physically see the gun. The Governor neglects to acknowledge, however, that during the hearing, Johnson stated that when she first got in the car she was unaware that guns were in the vehicle because she

did not see them and she did not know where Baldy got them from in the car. Johnson's 2009 statements concerning the guns and their origin is, in sum and substance, the same information that Johnson had related for more than ten years on the topic and does not reflect a change in her explanation.

Indeed, from 1994 to the present Johnson provides the same general explanation of the crime. She relates that she learned of Travis's injury, and went to look for him. She found him nearby, and drove Baldy and Travis in Baldy's car intending to take them to the hospital. En route, they stopped at a traffic light and Travis pointed out the person who beat him up. Baldy got out of the car with a gun, fired shots at the man and Johnson picked up a gun from the car and intentionally fired at Crier. Johnson did not learn until later that Crier died or that Gibson had been injured because Johnson, Baldy and Travis immediately fled the scene. Finally, Johnson has consistently maintained that although she fired the gun she did not know that the bullets from her gun actually struck anyone.

The evidence simply does not prove that Johnson "continues to change her explanation" to the extent the Governor claims. A few of the statements the Governor cites, read in isolation, might demonstrate that Johnson lacks insight or seeks to minimize her role in the crimes. But, in pointing out the variations in Johnson's story, the Governor has exaggerated the importance of a few statements and underestimated the influence of their context. As previously indicated the Governor' analysis omits Johnson's explanations which put the statements in context and Johnson's contemporaneous statements of responsibility and remorse that often followed her explanation of the crime. At every Board hearing since 2003 Johnson testified at length concerning her feelings of remorse and responsibility. The Board has accepted Johnson's statements as a genuine reflection of regret and responsibility. For example, in 2005, the Board noted: "You do show signs of remorse, indicated that you understand the nature and magnitude of your offense and accept full responsibility for your criminal behavior." In 2006, the Board found "you have accepted the fact that you were there at the time of the shooting. You in fact had a weapon in your hand and you in fact shot the victim. . . . Consequently, we accept that and we believe that you have shown reasonable remorse."

"[A]cceptance of responsibility works in favor of release '[n]o matter how longstanding or recent it is,' so long as the inmate 'genuinely accepts responsibility. . . .'" (*In re Elkins* (2006) 144 Cal.App.4th 475.)

While it is certainly true that Johnson has added details to her explanation of the crime, her story has remained essentially the same for almost 15 years. In fact, her embellishment of the explanation could have as much to do with the interviewing and reporting skills of the various evaluators as Johnson's level of insight into the situation.

In sum, the Governor's reliance on a purported "change in her explanation" to demonstrate a lack of insight is not demonstrably shown by the record, and therefore is not "some evidence" that she lacks insight. (See *In re Calderon, supra,* 184 Cal.App.4th at pp. 689-690.)

Finally, the "changes" in Johnson's explanation that exist are insignificant. The inconsistencies in Johnson's version (i.e., whether and how far she got out of the car) are minor; they are likely due to the passage of time since the offense coupled with the natural human tendency for memory loss attributable to age. Such inconsistencies are less meaningful in the light of her strong expressions of responsibility, statements of remorse and admissions of guilt about her conduct. None of the inconsistencies shows that Johnson continues to change her explanation in an inexplicable manner or in meaningful ways on key points and none of them, provides "some evidence" that Johnson lacks insight into and understanding of the behavior that led to Gibson's injury and Crier's death.

In any event, the Governor does not articulate a rational nexus between these minor discrepancies and present dangerousness, and we fail to see such a connection, particularly in light of Johnson taking responsibility for the commitment offense and her exemplary prison record for nearly 15 years. (See *In re Moses* (2010) 182 Cal.App.4th 1279, [minor discrepancies in an inmates version of a crime do not standing alone demonstrate a rational nexus to current dangerousness].)

b) Inconsistencies Between Johnson's Statements and the Official Version of the Crime.

In addition to relying upon varying explanations Johnson has offered over the years, the Governor also concluded that Johnson lacked insight and had minimized her actions because Johnson's description of the crime differed from Gibson's version and did not correspond with other physical evidence of the crime. The Governor concludes Johnson's lack of insight into the circumstances of the commitment offense provides the "rational nexus" for concluding that Johnson still provides a danger to society. We disagree. Although the Governor acknowledged that Johnson had said she accepted responsibility for her actions and was remorseful, the Governor in essence was requiring Johnson to admit to the same version of facts as he had arrived at.

The Governor, like the Board, "is precluded from conditioning a prisoner's parole on an admission of guilt. (Pen.Code, § 5011, subd .(b); Cal.Code. Regs, tit. 15, § 2236.)" (*In re Palermo* (2009) 171 Cal.App.4th 1096, 1110. (*Palermo*).) Furthermore an inmate need not agree with or adopt the official version of a crime in order to demonstrate insight and remorse. (*Palermo, supra,* 171 Cal.App.4th at p. 1110.) *Palermo* is instructive. There, the Third District Court of Appeal granted relief to a habeas petitioner who challenged the Board's denial of parole. The Board's denial was based in part on the inmate's continued insistence that he had accidentally shot his girlfriend with his gun, which was at odds with the inference from the evidence presented by the prosecutor at trial. (*Id.* at pp. 1110-1111.) The appellate court concluded that "defendant's version of the shooting of the victim was not physically impossible and did not strain credulity such that his denial of an intentional killing was delusional, dishonest, or irrational. And . . . defendant accepted 'full responsibility' for his crime and expressed complete remorse; he participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated him opined that he did not represent a risk of danger to the public if released on parole. Under these circumstances, his continuing insistence that the killing was the unintentional result of his foolish conduct (a claim which is not necessarily

inconsistent with the evidence) does not support the Board's finding that he remains a danger to public safety." (*Id.* at p. 1112.)

Similar to the prisoner in *Palermo*, and unlike the inmates in *Shaputis*, supra, 44 Cal.4th 1241,[12] *In re McClendon* (2003) 113 Cal.App.4th 315,[13] and *In re Van Houten*[14]

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[12] This case stands in contrast to *Shaputis* where the Supreme Court found the inability of the inmate "to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming,'" was some evidence of his dangerousness and unsuitability for parole. (*Shaputis, supra*, 44 Cal.4th at p. 1260.) The Court concluded that Shaputis' killing his wife "was the culmination of many years of [his] violent and brutalizing behavior toward the victim, his children, and his previous wife," (2) his continuing claim that the killing was unintentional was contrary to undisputed evidence that the gun he used "could not have been fired accidentally, because the hammer was required to be pulled back into a cocked position to enable the trigger to function, and the gun had a 'transfer bar' preventing accidental discharge" and (3) his recent psychological reports reflected that his character, as shown by the killing and his "history of domestic abuse," "remain[ed] unchanged" at the time of the parole hearing. (*Id.* at pp. 1259-1260.) Unlike in *Shaputis*, where the inmate's claims of insight and responsibility were undercut by the evidence of a significant history of domestic violence, were contrary to the physical evidence and belied his mental state, here, Johnson's statements of responsibility and remorse are supported by her conduct and programming over the past twenty years of incarceration.

[13] In *McClendon*, the inmate arrived around midnight at the home of his estranged wife; was wearing rubber gloves and carrying a loaded handgun, a wrench, and a bottle of industrial acid; "barged . . . into" the residence; aimed the gun at his wife and the man with whom she was sitting on the couch and talking; shot his wife in the head; and, when the gun jammed, struck the man two or three times in the head with the wrench. (*McClendon, supra*, 113 Cal.App.4th at pp. 319-320, 322.) The inmate claimed the shooting was unintended, and he showed no remorse for the killing and attack on the male victim. (*Id.* at p. 322.) Accordingly, his failure to accept complete responsibility for killing his estranged wife – instead claiming it was unplanned, despite overwhelming evidence that it was a calculated attack – was some evidence of his continuing dangerousness at the time of the parole hearing. (*Ibid*.)

[14] In *Van Houten*, the inmate, a disciple of Charles Manson, "felt 'left out' [because she was not asked to take part in the brutal murders of Sharon Tate, Voitcek Frykowski, Abigail Folger, Jay Sebring, and Steven Parent] and wanted to be included next time." (*Van Houten, supra*, 116 Cal.App.4th at pp. 344, 345.) Getting her wish, she participated in the fatal stabbings and "gratuitous mutilation" of two victims, and said that "'she had

(2004) 116 Cal.App.4th 339, Johnson's "version of the shooting was not physically impossible and did not strain credulity such that her explanation was delusional, dishonest, or irrational. And, unlike the defendants in *Van Houten, Shaputis*, and *McClendon*, [Johnson] accepted 'full responsibility' for her crimes and expressed complete remorse; participated effectively in rehabilitative programs while in prison; and the psychologists who evaluated her from the mid-2000s and thereafter have opined that she represented a low risk of danger to the public if released on parole. Under these circumstances, her continuing insistence [even at the most recent suitability hearing in 2009] that Gibson's version was wrong[15] and that the killing occurred in the manner Johnson claimed (a claim which is not necessarily inconsistent with the evidence) does not support the [Governor's] finding that she remains a danger to public safety. [Citation.]" (*Palermo, supra*, 171 Cal.App.4th at p. 1112.) In light of *Palermo,* Johnson's failure to accept Gibson's version of the facts is not evidence in and of itself that Johnson continues to pose a danger to public safety.

Similarly, we do not agree with the Governor's claim that Johnson's version conflicts with the physical evidence of the crime. The Governor contends that at the 2009 hearing Johnson stated that when she fired the gun Crier was running away, that "he was already running after Baldy shot at him." The Governor points out that the autopsy

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stabbed a woman who was already dead, and that the more she did it the more fun it was.'" (*Id.* at pp. 346, 350, 351.) Although she "did not contest the Board's version of events" (*id*. at p. 355, fn. 9), she minimized her culpability and "deflect[ed] responsibility for her actions on Manson." (*Id.* at p. 355.) In light of the "egregious character of the offenses" and her "unstable social history," the inmate's "attitude" about the murders was some evidence she remained "an unstable person" in need of "continued therapy and programming" to obtain "further insight" concerning her "vicious and evilly motivated" actions before it could be said that she no longer posed a risk to public safety. (*Id*. at pp. 353, 355-356.)

15 One of the troubling aspects of Gibson's version was that it was presented in a rather cursory fashion at the preliminary hearing. Gibson was not subjected to a lengthy or rigorous cross-examination that she would have faced if the matter had gone to trial. In addition, Gibson's version is at odds with that of the independent witness Mr. White.

report showed that the fatal bullet entered Crier's body on his left side, slightly upward, from the front, and thus Crier was *not* hit while he was running away. Contrary to what the Governor contends, this physical evidence does not undermine Johnson's version. Johnson *did not* tell the Board that Crier was struck by the fatal bullet while he was running away. Johnson has always maintained that she had no idea which shot struck Crier or even that he had been hit. Rather Johnson stated to the Board that Baldy got out of the car, Baldy and Crier argued and then Baldy shot at Crier. At that point Johnson began to shoot at Crier as he ran away. Johnson's sequence of events is therefore not incompatible with the physical evidence of Crier's gun shot wound.

In sum, Johnson has a minimal criminal history as an adult; the killing of the victim was not so calculated and evil as to indicate, without more, that she remains a continuing danger to the public 24 years later; she has expressed remorse and accepted full responsibility for the killing, during her years of custody in prison; she has not received any disciplinary write-ups since 1996 and no serious rule violations in twenty years; she has effectively participated in rehabilitative programs; psychological evaluations opine she no longer represents a danger to public safety if released on parole; she has job skills and job offers if released; and she has a support network willing to ease her transition back into society. Applying the principles expressed in *Lawrence*, *supra*, 44 Cal.4th 1181, we conclude that, in light of the nature of Johnson's crime, the period of time that has elapsed since the crime, the affirmative evidence of her pre- and post-conviction conduct and her current mental state shown by her rehabilitative efforts and psychological evaluations, and her future prospects if granted parole, there is no evidence to support the Governor's finding that she poses a danger to public safety if released on parole.

In any event, even assuming that we accepted the Governor's factual finding that Johnson "continues to change her explanation" of the crime, we do not agree that this is some evidence that Johnson presents a current threat to public safety. (See *Shaputis*, *supra*, 44 Cal.4th at p. 1255.) Likewise nothing in the record supports the conclusion that

Johnson poses a threat to public safety because her version does not correspond to that presented by a victim during the preliminary hearing in 1986.

Accordingly, there is not "some evidence" in this record to support the Governor's cited factor of Johnson's lack of insight and failure to accept responsibility for the crime. This leaves only the gravity of the commitment offense as the single cited factor that could be said to be supported by a modicum of evidence favoring Johnson's unsuitability for parole.

2. The Commitment Offense

We agree with the Governor that the circumstances of the commitment offense were "especially heinous" and also that the reason for the crime was "trivial in relation to the offense she committed." Johnson's conduct showed a callous and cruel disregard for the life of Crier and Gibson. The commitment offense fully justified Johnson's conviction and sentence for second-degree murder. However, even though there is some evidence to support the finding that Johnson's second-degree murder was committed in a cruel and callous manner and the motive was concededly trivial (§ 2402, subd. (c)(1)(E)), such reason would only provide "some evidence" to support the ultimate conclusion and denial of parole here if there were other facts in the record, such as the inmate's history before and after the offense or the inmate's current demeanor and mental state, to provide a "rational nexus" for concluding Johnson offense continues to be predictive of current dangerousness. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1210, 1213, 1221.) As the court in *Lawrence* stated, "the mere existence of a regulatory factor establishing unsuitability does not necessarily constitute 'some evidence' that the parolee's release unreasonably endangers public safety. [Citation.]" (*Id*. at p. 1225.)

The factors cited by the Governor as providing the "rational nexus" between the commitment offense and Johnson's current risk of dangerousness are her "lack of insight and failure to accept responsibility" for the shootings. It is certainly possible that the commitment offense, insufficient insight into the offense, and the failure to accept full responsibility for one's actions considered together may provide a "rational nexus" for concluding that the commitment offense continues to be predictive of current

dangerousness. However, as we have discussed elsewhere, the Governor's contention that Johnson lacks insight and has failed to accept responsibility for her actions is not reasonable based on the record that was before the Governor. Nor are there other facts or current circumstances on this record, such as Johnson's pre- or post-incarceration history, or her demeanor and mental state, to show that the implications regarding her dangerousness that derive from her commitment offense remain probative to the determination of a continuing threat to public safety. Her antisocial personality disorder is in total remission such that she no longer warrants a diagnosis for the condition; she has a discipline free prison record for at least 15 years; she has successfully participated in vocational and educational courses in prison as well as individual and group programs aimed at addressing the underlying issues which contributed to her criminal conduct. Thus, based on the record before us, the commitment offense, notwithstanding its nature, has not been shown to be persuasive as to the ultimate determination of Johnson's current dangerousness.

But for the immutable nature of her crime, and the unsupported inference that she did not have insight into the commission of the crime or accept responsibility for it, all the applicable regulatory criteria indicate that Johnson is suitable for parole. (§ 2402, subd. (d).) Johnson has been a model prisoner since 1996; she has addressed anger and substance abuse that lead to her life of crime via formal self-help, vocational and educational programs, therapy and religion. Johnson had a minimal prior criminal record as a juvenile, has had remaining mental health issues, and has remained discipline free in prison for over 20 years. Various psychological and psychiatric evaluators unanimously have concluded that she is a very good candidate for parole and would unlikely reoffend if released. The latest psychological evaluator concurred in this assessment, finding Johnson to be in the very lowest risk group for violence if released. The Board found Johnson credible, remorseful and that she had insight into the crime for which she accepted full responsibility. Johnson further has marketable skills, a supportive community outside of prison and realistic parole plans, including a temporary job offer, plus backup plans.

There simply is not "some evidence" from the 2009 parole suitability record to support the Governor's reversal of the Board's determination that Johnson did not pose an unreasonable risk of danger to society if released on parole.

In sum, we conclude, under the standards adopted by *Lawrence*, *supra*, 44 Cal.4th 1181, and the application of those standards in this case, the Governor's decision violates Johnson's due process rights. Accordingly, Johnson is entitled to habeas relief.[16] Because the Governor's finding of suitability has no evidentiary support, it cannot stand.

Although the Attorney General argues the appropriate relief is to remand the matter back to the Governor for further consideration in accordance with due process standards, the Attorney General has not explained what purpose a remand would serve in this case. "The Governor's constitutional authority is limited to a review of the evidence presented to the Board. [Citations.] Our review indicates that the record does not contain some evidence to support the Governor's decision and further consideration by the Governor will not change this fact." (*Vasquez*, *supra*, 170 Cal.App.4th at p. 386.) The Attorney General has not identified any other evidence in the record bearing on Johnson's current dangerousness that the Governor has not considered or that was not reflected in the Governor's decision. Accordingly, we conclude the appropriate relief in this case is to vacate the Governor's decision, reinstate the Board's 2009 decision, and order Johnson's release subject to the conditions specified in the Board's 2009 decision. (See, e.g., *In re Burdan* (2008) 169 Cal.App.4th 18, 39-40; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491; *In re Gray*, supra, 151 Cal.App.4th 379, 410-411; *In re Lee* (2006) 143 Cal.App.4th 1400, 1414-1415; *In re Scott* (2005) 133 Cal.App.4th 573, 603-604.)

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16 Because we grant Johnson relief, we need not further address her assertion the Governor did not give adequate weight to the positive factors in her background and post incarceration programming that favor her release from prison.

DISPOSITION

The petition for writ of habeas corpus is granted. The Governor's decision to reverse the Board's 2009 order granting Johnson parole is vacated, and the Board's parole release order is reinstated. In the interests of justice and to prevent frustration of the relief granted, this decision shall be final as to this court five days after it is filed. (Cal. Rules of Court, rule 8.387(b)(3)(A); *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1492.)

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.